IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

Ujagar Singh & anr. Vs. Saheb Khan & anr.

S.B.CIVIL FIRST APPEAL NO.134/2000 AGAINST THE JUDGMENT AND DECREE DATED 2.5.2000 PASSED BY ADDL. DISTT. JUDGE NO.2, ALWAR IN C.O. NO.153/1988.WHEREBY THE SUIT OF THE SPECIFIC PERFORMANCE FILED BY PLAINTIFF-RESPONDENT NO.1 HAS BEEN DECREED.

Date of Judgment ** March 02, 2007

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. B.L.Mandhana, for the appellants.
Dr.P.C.Jain, for the respondents.

BY THE COURT:

REPORTABLE

1. This appeal under section 96 CPC is directed against the judgment and decree dated 2.5.2000 passed by learned ADJ No.2, Alwar decreeing the civil suit no.153/88 in favour of plaintiff Saheb Khan for specific performance. The defendant Ujagar Singh has filed this appeal along with Naboo S/o Habib Meo, allegedly subsequent purchaser of the portion of agriculture land in question.

2. The facts in brief are that the plaintiff came to the court with the plea to the effect that defendant no.1 Ujagar Singh had agreed to sell vide agreement dated

6.12.1986 his agriculture land of 7 bighas 2 biswas comprised in Araji Khasra No.280-one bigha, one biswa; Khasra no.281-one bigha on biswa; Khasra No.244-six biswa; Khasra no.245-one bigha; Khasra no.663-three bighas 14 biswas and also one “Bakhal” consisting of two adjoining houses over 45'x40' sq.ft. for a total consideration of Rs.1,00,000/- (Rupees one lac only) and on the said date of agreement i.e. 6.12.86, the defendants received advance sum of Rs.40,000/- in cash from the plaintiff and agreed to execute the registered sale-deed in favour of the plaintiff on payment of balance amount of Rs.60,000/-. However since the possession of the suit property was not handed over to the plaintiff at the time of said agreement. According to the plaintiff, on 4.2.87 when the plaintiff offered to pay balance amount of Rs.60,000/- and asked the defendants to execute the sale-deed in his favour, the defendants refused and, therefore, cause of action arose to the plaintiff and he filed the aforesaid civil suit for specific performance.

3. The said suit was contested by the defendants and in the written statement filed by defendant no.1 Ujagar Singh, it was inter alia stated that out of Khasra Nos.244, 245 and 280, on 20.9.86 itself, prior to Agreement to Sell with the plaintiff, the defendants had entered into an Agreement to sell in favour of one

Gurmeet Singh and Sohan Lal for a sum of Rs.47,000/- for sale of agriculture land to the extent of 2 bigha 7 biswas, under which the sale-deed in their favour was to be executed before 30.6.87. The defendants also denied the execution of the Agreement to Sell in favour of plaintiff. During the pendency of the suit, son of Ujagar Singh i.e. Balkar Singh who is now substituted as legal representative of Ujagar Singh and is pursuing this appeal, further sold another portion of the said agriculture land admeasuring 1 bigha, 1 biswa out of Aaraji Khasra No.281 to Naboo and, therefore, the plaint was amended by the plaintiff to challenge the said subsequent sale in favour of Naboo and Naboo was impleaded as defendant no.2 in the plaint.

4. The learned trial court on the basis of pleadings of the parties, framed the following issues for trial:

(i)Whether the defendants had agreed to sell the suit property specified in para no.1 of the plaintiff for a sum of Rs.1,00,000/- under the Agreement to Sell dated 6.12.86 and whether the defendants had received the advance of Rs.40,000/- in cash from the plaintiff against that?

(ii)Whether the Agreement to Sell dated 1.6.98 executed by defendant Balkar Singh in respect of Khasra No.281 measuring 1 bigha, 1 biswa in favour of defendant no.2

Naboo Meo is void against the plaintiff?

(iii)Whether the plaintiff was ready and wiling to perform his part of contract?

(iv)Whether the special additional plea in para no.3 of the written statement is based on Sec.41 of Rajasthan Tenancy Act?

(v)Whether the agreement is inadmissible in evidence on account of inadequate stamp duty and being unregistered?

(vi)Whether the defendants are entitled to special damages?

(vii)Relief?

5. Mr.B.L.Mandhana, learned counsel appearing for the appellant-defendants pressed his challenge against the findings of the learned trial court only with respect to issue no.2 and, therefore, issue no.2 i.e. Whether the agreement to sale dated 1.6.98 in favour of Naboo was void qua the plaintiff-respondent or not and whether on this ground, decree for specific performance deserves to be set aside or not?

6. The case of the defendant-appellant before the learned trial court was that the sale-deed in favour of defendant no.2 Naboo was executed on 1.6.98 in pursuance of an Agreement to Sell executed by defendant no.1 Balkar Singh on 26.7.83 and he was a bonafide purchaser without

notice of any Agreement to Sell executed by Ujagar Singh in favour of plaintiff Saheb Khan and, therefore, such sale could not be said to be void and in view of such sale of portion of agriculture land in question, the specific performance of the contract by Ujagar Singh in favour of plaintiff was impossible to be performed and, therefore, the decree could not be given for specific performance in favour of plaintiff. The plaintiff contested this stand of the defendant before the trial court by submitting that in the suit on 8.2.87, Sh.Kailash Nath Bhargava, Advocate appeared on behalf of defendant before the trial court and gave undertaking that the suit property shall not be alienated. The said suit was dismissed in default on 11.5.1993 but was restored on application on 28.5.93 without any objection on the part of defendant, therefore, no sale-deed could be executed in favour of Naboo on 1.6.98 during the pendency of the suit and said sale was hit by Section 52 of the Transfer of Property Act by the doctrine of lis pen-dense and thus the said sale in favour of Naboo deserves to be ignored being void.

7. The learned trial court agreed with the case of plaintiff on this ground and held that the sale in favour Naboo on 1.6.98 in pursuance of alleged agreement dated 26.7.83 was not a bonafide sale and was therefore illegal and void being against the stay order granted by the

trial court on 8.2.87 upon undertaking of the Advocate appearing on behalf of the defendants.

8. On other issues also since the trial court gave the findings in favour of plaintiff that he was ready and willing to perform his part of contract and the Agreement to Sale dated 6.12.86 in favour of plaintiff was proved, the learned trial court decreed the suit for specific performance and directed the defendants to execute the sale-deed in favour of plaintiff on payment of Rs.60,000/- within a period of one month from the said date and the sale-deed dated 1.6.98 in favour of defendant no.2 Naboo was declared illegal and void.

9. Mr.Mandhana, learned counsel for the appellants raised mainly the following contentions in support of the appeal-

(i) That despite the fact of an earlier Agreement to Sell executed by the defendant Ujagar Singh in favour of Gurmeet Singh and Sohan Lal on 20.9.86 having been disclosed in the written statement and thus the plaintiff put to knowledge thereof, failure on the part of respondent-plaintiff to take necessary steps by way of replication or otherwise to challenge the said agreement, the specific performance of the agreement for sale of 7 bigha and 2 biswas was impossible of performance and thus the agreement was rendered unenforceable in view of the

fact that the said persons Gurmeet Singh and Sohan Lal not only proceeded seeking enforcement of agreement in their favour by filing the suit for specific performance in respect of portion of (Khasra No.244- six biswas; Khasra No.245-one bigha and Khasra no.280-one bigha, one biswa), totalling 2 bighas and 7 biswas and the said suit was decreed, ofcourse exparte against the defendant Ujagar Singh and in pursuance of said decree in their favour, the trial court has executed the sale-deed in respect of said portion of the agriculture land on 1.8.2000 in pursuance of exparte decree dated 19.12.88 in civil suit no.31/87 and in execution case no.2/95 filed by the said purchasers Gurmeet Singh and Sohan Lal and, therefore, the decree for specific performance in favour of plaintiff could not be granted.

Mr.Mandhana has placed the copy of this sale-deed executed by the trial court along with the copy of the suit filed by said Gurmeet Singh and Sohan Lal along with the application under O.41 R.27 CPC filed in this court on 6.2.2007 during the course of hearing of this appeal, to which a contesting reply has been filed by the plaintiff-respondent on 8.2.2007 opposing the said application under O.41 R.27 CPC.

(ii) That on behalf of appellant-defendant no.2 Naboo also, Mr.Mandhana learned counsel submitted that sale in

favour of Naboo by Balkar Singh as un-assailable and the same was not hit by Sec.52 of the Transfer of Property Act in any manner. Relying on the provisions of Sec.19(b) of the Specific Relief Act, 1963 and various case laws, he submitted that Naboo being a bonafide purchaser without notice and for consideration, sale in his favour could not have been declared void by the trial court.

10. Mr.Mandhana, learned counsel for the appellants further submitted that failure on the part of plaintiff-respondent to take steps to assail the Agreement to Sell in favour of Gurmeet Singh and Sohan Lal was also fatal to his case and, therefore, the suit for specific performance deserves to be dismissed. He further alleged that no case for specific performance of part of contract was pleaded or made out by the plaintiff before the trial court in view of Sec.12(3) of the Specific Relief Act, 1963 and, therefore, whole of the suit filed by the plaintiff-respondent Saheb Khan was liable to be dismissed and his appeal was found to be allowed.

11. He relied upon the following judgments in support of his submissions:

(i) **M/s. Anant Construction Pvt. Ltd. Vs. Ram Niwas** (1995 (1) Current Civil Cases, 154 (Delhi High Court)- on the point of replications

(ii) **Udairam Vs. State** (1963 RLW 66 (Raj.)-Held that the

delivery of possession was not void on the ground that he was restrained by a temporary injunction not to take possession.

(iii)**Vimla Ammal Vs. C.Suseela and ors.** (AIR 1991 Madras 209)- In the suit for specific performance, the subsequent purchaser of the property is a necessary party.

(iv)**Bala Narasimha and ors. Vs. Gangaputra Cooperative Housing Society and ors.** (AIR 1984 Andhra Pradesh 166)- Persons claiming under earlier agreements of sale in their favour and in possession of the suit property-Are necessary and proper parties to the suit, notwithstanding citer where no consequential relief of possession or injunction was claimed.

12. *Per contra*, Dr.P.C.Jain, learned counsel appearing for the plaintiff-respondent vehemently submitted that the conduct of the defendants is not only absolutely collusive and blame-worthy but in the suit for specific performance, he urged that only thing to be proved was existence of Agreement to Sell in favour of plaintiff and his readiness and willingness to perform his part of the contract and the rights of the plaintiff could not be difeated by alleged rights of subsequent purchaser like Naboo much less by the alleged rights of Gurmeet Singh and Sohan Lal who claimed under ex-parte decree in a collusive suit against the defendant Ujagar Singh. He

submitted that both these other agreements/sale-deeds even if assumed to have been executed were merely to defeat the performance of contract qua the plaintiff Saheb Khan and the said agreement being void deserve to be ignored and, therefore, the trial court has rightly passed the decree in favour of the plaintiff. He relied upon the following judgments in support of his submissions:-

(i) **Kasturi Vs. Iyyamperumal & ors.** [2006(1) RRT 34]

> "The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit, for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all. Lord Chancellor Cottenham in Tasker Vs. Small, 1834 (40) English Report 848 made the following observations:-
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> > "It is not disputed that generally to a bill for a specific performance of a contract for sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The court assumes jurisdiction in such cases, because

> a court of law, giving damages only for the non-performance of the contract, in may cases does not afford an adequate remedy. But in equity, as well as in law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceedins to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

11. The aforesaid decision in 40 E.R.848 was noted with approved in (1886)2Ch.164 (De Hogton Vs. Money) at page 170 Turner, L.J.observed:

> "Here again his case is met by (1834) 40 E.R.848 in which case it was distinctly laid down that a purchaser cannot, before his contract is carried into effect, enforce against strangers to the contract equities attaching to the property, a rule which, as it seems to me, is well founded in principle, for if it were otherwise, this court might be called upon to adjudicate upon questions which might never arise, as it might appear that the contract either ought not be, or could not be performed."

> "As noted hereinearlier, in a suit for specific performance of a contract for sale, the issue to be decided is the enforceability of the contract entered into between the appellant and the respondent nos.2 & 3 and whether contract was executed

by the appellant and the respondent nos.2 & 3 for sale of the contracted property, whether the plaintiff were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against the respondent nos.2 & 3. It is an admitted position that the respondent nos.1 and 4 to 11 did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance of the contract for sale has been filed. Admittedly, they based their claim on independent title and possession of the contracted property. It is,therefore, obvious as noted hereinearlier that in the event, the respondent nos.1 and 4 to 11 are added or impleaded in the suit, the scope of the suit for specific performance of the contract for sale shall be enlarged from the suit for specific performance to a suit for title and possession which is not permissible in law. In the case of Vijay Pratap & ors. Vs. Sambhu Saran Sinha and ors. reported in (1996) 10 SCC 53, this court had taken the same view which is being taken by us in this judgment as discussed above. This court in that decision clearly held that to decide the right, title and interest in the suit property of the stranger to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be turned into a regular title suit. Therefore, in our view, a third party or a stranger to the contract cannot be added so as to convert a suit of one character into a suit of different character."

(ii)**Raminder Singh and anr. Vs. Sham Lal and anr.** (AIR 1984 P&H 145)

(iii)**Padmaja Vs. Erattil Sajeev and ors.** (AIR 2007 (NOC) 70 (KER.)

"The right of a transferee

pendente lite is subservient to the decree and he is bound by the decree passed in the suit against his transferor. The decree can be enforced even against the tranferee without notice. The benefit that could be claimed by a subsequent transferee under S.19(b) of the Specific Relief Act would not be available to a transferee pendente lite. What is contemplated by S.19(b) is a transfer subsequent to the original contract and the transferr being a bonafide purchaser without notice of the original contract. S.19(b) does not apply in a case where a suit is filed before the transfer in favour of the subsequent transferee. In other words, the moment the suit is filed, the partiesare governed by Section 52 of the Transfer of Property Act and would not be governed by S.19(b) of the Specific Relief Act. Both these provisions operate in different fields. S.19(b) would have application to a transaction before suit while S.52 operates against a transfer subsequent to the institution of the suit. So long as the subsequent transferee does not claim under a transfer which came into existence before the institution of the suit, he cannot claim to be a transferee for value in good faith as provided in S.19(b) of the Specific Relief Act. A title which is hit by Section 52 of the Transfer Property Act

> could not be projected as a valid title to deny the fruits of a decree in favour of the decree holder. The question whether a subsequent transferee is having possession of the propertyor whether he paid proper consideration to his transferor or whether he was aware of the litigation is not at all material or relevant for consideration."

(iv)**Chander and anr. Vs. Chumal and ors.** (CFA No.56/81) decided by learned Single Judge (Hon'ble Mr.Justice N.P.Gupta) on 20.3.2002.

13. Having heard the learned counsel at length and upon appreciation of aforesaid relevant case laws, this court is of the view that the present appeal has no force and deserve to be dismissed for the following reasons.

14. Section 52 of the Transfer of Property Act, 1982 which is reproduced hereunder prohibits the transfer of property by a party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. In brief this provision contains the doctrine of *lis pendense* and prohibits creation of third party rights during the pendency of the suit, in order to protect and preserve the suit property so that when the inter-party

rights are determined by the Court on the basis of pleadings and evidence, such suit property is available to be given and enjoyed by the party in whose favour the right is found by the Court.

> " 52. Transfer of Property pending suit relating thereto.- During the [pendency] in any Court having authority [[within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by [the Central Government] [***] of [any] suit or proceedings which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.
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> [Explanation.-For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]"

15. Though the grant of specific performance is a discretionary relief to be granted to the plaintiff on the discretion of the Court, such discretion of the Court

is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. The circumstances in which a decree of specific performance may be denied to the plaintiff are enumerated in Section 20(2) of the Specific Relief Act, 1963. Broadly the situations are, where the contract under the specific performance is sought, though not voidable, gives the plaintiff an unfair advantage over the defendant; where purpose of the contract would involve some unforeseen hardship to the defendant and its non performance would not involve any such hardship to the plaintiff or where it is inequitable to enforce specific performance. The circumstance specified in Section 20 are only illustrative not exhaustive. The Court would take into consideration the circumstances in each case, the contract of the parties and the respected interest under the contract. See Sardar Singh V/s. Krishna Devi(Smt.) and Anr., (1994) 4 SCC 18. The specific performance of even a part of the contract is envisaged in Section 12 of the Act in the stipulated circumstance, where the specific performance of part of the contract which is substantial part of the whole and does not admit of compensation in monetary terms. Section 19 of the Act provides for a relief against parties and persons claiming under them by subsequent title. Clause-(b) of the said Section 19 provides that specific performance of a contract may be enforced

against any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who paid his money in good faith and without notice of the original contract. Clause-(c) envisages enforcement of specific performance even against any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant. The remedy of specific performance undoubtedly thus lies in the realm of equity and the Court has ample discretionary powers to grant specific performance of whole or part of a contract and at the same time to refuse specific performance too on a cogent and reasonable grounds.

16. Viewed in the light of aforesaid legal position, the facts established in the present case leads this Court to believe that the defendant Ujagar Singh now represented through his son Balkar Singh entered into collusive suit and/or collusive transaction, to defeat the claim of the plaintiff Saheb Khan and to avoid the performance of the contract for sale of agricultural land in question including 'Bakhal' i.e. constructed house for the sum of Rs.1,00,000/- against which defendant had accepted an advance of Rs.40,000/- and for which trial Court found that plaintiff was ever ready and willing to pay the balance amount of Rs.60,000/- and get the sale deed executed in his favour.

17. The agreement with Gurmeet Singh and Sohan Lal for part of land situated in Khasara Nos. 244, 245 & 280 on 20.9.86 as against the agreement dated 6.12.86 with the plaintiff Saheb Khan and after the present suit was filed by plaintiff on 6.2.87, filing of the suit by Gurmeet Singh and Sohan Lal on 4.7.87 and thereafter the said suit of the Gurmeet Singh and Sohan Lal remained not defended by defendant Ujagar Singh ultimately resulting in execution of ex-parte decree on 9.12.88 and in pursuance of the same upon execution filed after 7 years in 1995 and ultimately sale deed executed by the trial Court in favour of Gurmeet Singh and Sohan Lal on 1.8.2000, all these events happened during the pendency of the present suit in which on 20.3.87 an undertaking was given on behalf of defendant Ujargar Singh not to alienate the property, clearly shows the collusive manner in which the defendant Ujagar Singh allowed the suit filed by Gurmeet Singh and Sohan Lal to proceed ex-parte resulting in its decree and execution both. If the agreement with Gurmeet Singh and Sohan Lal alleged to be executed on 20.9.86 just two and half months prior to the agreement with plaintiff Saheb Khan, was genuine and bonafide, the defendant Ujagar Singh should have made his breast clean by entering into the agreement with the plaintiff Saheb Khan only after executing the sale-deed said land agreed to be already sold to Gurmeet Singh and Sohan Lal but he did not do so. The sequence of dates

speak for themselves and establish, in the opinion of this Court, that the agreement in favour of Gurmeet Singh and Sohan Lal alleged to be on 20.9.86 was sham. Therefore, contention of learned counsel for the defendant appellant before this Court raising hue and cry that the Gurmeet Singh and Sohan Lal ought to have been impleaded as parties by the plaintiff in the present suit while not being able to explain his own conduct of allowing that suit to proceed ex-parte decreed and executed against him, does not cut any ice.

18. The second instance of sale deed in favour of Naboo also deserves to fall on the same ground. In his favour the agreement is shown to have been executed by Balkar Singh way back on 26.7.87, however, the registered sale deed was executed on 1.6.88 much after the present suit was filed and an undertaking given in the trial Court. Upon coming to know of the registered sale deed executed in favour of Naboo, the plaintiff moved the Court and impleaded Naboo also as defendant No.2 and which agreement has been found as unenforceable in view of Section 52 of the Transfer of Property Act by the learned trial Court and rightly so in the opinion of this Court.

19. The agreement in favour of plaintiff Exhibit-1 executed by defendant Ujagar Singh has been duly proved by the plaintiff in his statement recorded by the trial

Court on 4.5.99. The thumb impression of Ujagar Singh have been duly attested by two witnesses Rehman and Niranjan Singh and he was also duly identified by a Advocate Sardar Singh. In his cross examination PW1 Saheb Khan, the plaintiff has maintained his statement and could not be controverted in any manner by the defendant. The attesting witnesses Niranjan Singh PW2 and Rehman PW3 have also supported the execution of the said agreement. Thus once the Agreement to Sell is proved and found to be unassailable and the readiness and willingness of the plaintiff to perform his part of the contract namely to pay the balance sum of Rs.60,000/- and get the registered sale deed executed in his favour is also not doubted any where, there is also no reason to deny him the specific performance of the said contract. The collusive transaction entered into by defendant Ujgar Singh or his son Balkar Singh in the presence of defendant Ujgar Singh as the alleged agreement dated 26.7.83 which bears his thumb impression, would only indicate that the defendants had sought to defeat the specific performance of the contract in favour of plaintiff Saheb Khan in a wrongful and illegal manner.

20. Therefore, this Court finds that the trial Court was absolutely justified in deciding the issue No.2 in favour of the plaintiff and awarding specific performance of the agreement dated 6.2.86 in favour of the plaintiff.

21. There is no force in this appeal of the defendants and the same is accordingly dismissed with costs which is quantified at Rs.5000/-.

(Dr.VINEET KOTHARI),J.

Srawat/-